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No. 01-1500

In the Supreme Court of the United States

ERICK CORNELL CLAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Court-appointed amicus disputes the government's submission that, when a defendant does not petition this Court for certiorari on direct appeal, his judgment of conviction becomes "final," for purposes of 28 U.S.C. 2255 para. 6(1), when the time for seeking certiorari expires. Amicus does not, however, dispute the principal proposition on which that submission is based: the term "final" has a well-settled meaning under this Court's cases dealing with collateral relief, and that meaning is identical to the one that the government, petitioner, and six courts of appeals accord the term "final" as used in Section 2255, which governs the availability of collateral relief for federal prisoners.

Under the Court's collateral review cases, a criminal judgment not reviewed by this Court becomes "final" when "the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994). The Court consistently

used that definition of finality in a series of cases involving both state and federal defendants dating back more than 30 years before the enactment of Section 2255 para. 6(1) as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. See, *e.g.*, *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987); *United States* v. *Johnson*, 457 U.S. 537, 542 n.8 (1982); *Linkletter* v. *Walker*, 381 U.S. 618, 622 n.5 (1965). As amicus acknowledges (Br. 28), the Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents." *United States* v. *Wells*, 519 U.S. 482, 495 (1997). Because Section 2255, like the Court's cases defining finality, applies in the context of collateral review of criminal convictions, there is a particularly strong reason to presume that Congress intended "final" to have the same meaning in Section 2255 para. 6(1) as in those decisions. See *Porter* v. *Nussle*, 534 U.S. 516, 527-528 (2002) (relying on cases from most closely related context to ascertain meaning of statutory term). None of the reasons advanced by amicus justifies failing to accord "final" as used in Section 2255 the term's well-established meaning in the law of collateral review.

A. The Language Of Section 2244 Does Not Justify Failing To Give "Final" As Used In Section 2255 Its Established Meaning In The Collateral Review Context

Amicus's primary argument (Br. 8-21) is that "final" as used in Section 2255 cannot be accorded its established meaning in the collateral review context because Congress failed to include in that section certain language that Congress included in 28 U.S.C. 2244, the parallel time limit provision for state prisoners seeking collateral relief under 28 U.S.C. 2254. Section 2255 provides that the time limit for filing a collateral attack runs from "the date on which the judgment of conviction becomes final," but Section 2244

states that the time limit runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Compare 28 U.S.C. 2255 para. 6(1) with 28 U.S.C. 2244(d)(1)(A). The language in Section 2244 clarifies that "final" as used in that section has its established meaning in the collateral review context. Amicus reasons by negative implication that "final" cannot have that established meaning in Section 2255 because Congress did not also include the clarifying language in Section 2255.

1. The inclusion in only Section 2244 of language clarifying the meaning of "final" is not, however, a sufficient reason to conclude that "final" necessarily means something else in other sections of the same statute. On the contrary, the "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). Thus, when language in one part of a statute establishes the meaning of a term used in that part of the statute, the Court generally presumes that the same definition applies to the term where it appears in other parts of the statute. See *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986).

Amicus erroneously contends (Br. 13) that the presumption that a word has the same meaning throughout a statute is inapplicable here because "Congress quite clearly did not use 'identical words' in § 2244 and § 2255." Congress quite clearly *did* use the identical word "final" in both sections. The presumption that "final" has the same meaning throughout the AEDPA is not rendered inapplicable because language clarifying the meaning of "final" is not also repeated each time "final" is used. If the clarifying language had to be repeated in order for the presumption to apply, the pre-

sumption would serve no purpose, because the statute's meaning would already be clear.

Also contrary to amicus's contention (Br. 13), the presumption that "final" has the same meaning in Sections 2255 and 2244 is applicable even though the language in Section 2244 that clarifies the meaning of "final" is not written "in a definitional manner." This Court has repeatedly relied on language that clarifies a word's meaning in one part of a statute to ascertain the same word's meaning in another part of the statute even though the clarifying language is not framed as a definition. See, *e.g.*, *Gustafson*, 513 U.S. at 569 (deriving meaning of "prospectus" in Section 12 of the Securities Act of 1933, 15 U.S.C. 77j, 77*l*, from language in Section 10 that clarifies its meaning even though "§ 10 does not define what a prospectus is"); see also *Commissioner* v. *Lundy*, 516 U.S. 235, 249-250 (1996) (deriving meaning of "claim" from context of its use in one provision of Internal Revenue Code and holding that same meaning applies to term as used in another Code provision); *Sullivan* v. *Stroop*, 496 U.S. 478, 483-484 (1990) (same regarding term "child support" used in related provisions of Social Security Act).

2. In support of his contention that "final" must have a different meaning in Section 2255 than in Section 2244, amicus relies (Br. 10) on the presumption articulated in *Russello* v. *United States*, 464 U.S. 16 (1983), that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 23 (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Application of the *Russello* presumption would not, however, support the reading of Section 2255 advanced by amicus. Instead, application of the presumption would lead to an implausible interpretation of Section 2255 that neither amicus nor any court has endorsed, and, for that

reason, the Court should reject reliance on *Russello* in this context.

If Congress's omission in Section 2255 of the clarifying language from Section 2244 gave rise to a negative inference, the logical inference would be that "final" in Section 2255 includes *no* aspect of the omitted language. Thus, application of the *Russello* presumption to the meaning of finality under Section 2255 would entail that neither "the conclusion of direct review" nor the "expiration of the time for seeking such review" could result in finality, because both those phrases are omitted from Section 2255. Under that interpretation of Section 2255, a federal prisoner's judgment of conviction would become final without regard to direct review—*i.e.*, immediately upon the district court's entry of judgment. Neither amicus nor any court has espoused that interpretation of Section 2255, under which many federal defendants would have to seek post-conviction relief long before the conclusion of their direct appeals.

This Court has not hesitated to decline to draw an "inference * * * from congressional silence" where it would lead to such absurd results, *Burns* v. *United States*, 501 U.S. 129, 136-137 (1991), and the Court should decline to do so here. See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2234 (2002) (rejecting application of the *Russello* principle in part because it would lead to the implausible conclusion that States could enact, but localities could not enforce, state safety rules).

Amicus seeks to avoid taking the negative inference on which he relies to its logical—and absurd—conclusion by contending (Br. 18-20) that, under *Russello*, the use of different language in two sections of a statute implies only that the two sections mean different things, not that they cannot overlap in any way. But the only reason that the sections are presumed in *Russello* to mean different things is that one section includes particular language that is omitted in

the other. The nature and degree of the difference in meaning therefore logically depends on the nature and degree of the difference in language. Amicus's suggestion (Br. 18-19) that the Court apply the presumption to one part of the omitted language—the phrase "the expiration of the time for seeking [direct] review"—but not the other—the phrase "the conclusion of direct review"—makes no sense. If the *Russello* presumption applies to *any* of the language included in Section 2244 and omitted from Section 2255, the presumption applies to *all* of that language.

Indeed, amicus agrees (Br. 20) that a court must give full effect to any negative inference the court draws from a statutory omission when the court applies the interpretive canon of *expressio unius est exclusio alterius*. Amicus contends, however, that the *Russello* principle is distinct from that canon and (for some unexplained reason) subject to a different rule. Amicus provides no support, however, for his contention that *Russello* is distinct from the *expressio unius* canon; and, in fact, *Russello* is simply an application of that broader principle.

In *Custis* v. *United States*, 511 U.S. 485 (1994), the dissent criticized the majority's reliance on *Russello* (*id.* at 492) as an unfounded application of the *expressio unius* principle. See 511 U.S. at 501 (Souter, J., dissenting, joined by Blackmun and Stevens, JJ.). In other cases, the Court or certain Justices have likewise described *Russello*-type analysis as application of the *expressio unius* canon. For example, in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 209 n.11 (1994), the Court described as based on *expressio unius* an argument that the inclusion of restrictions on judicial review in certain provisions of the statute implied the absence of a restriction in the provision at issue. Similarly, in *Christensen* v. *Harris County*, 529 U.S. 576, 582-583 & n.4 (2000), the Court described as an *expressio unius* argument the government's contention—which was supported by a citation to

Russello, see Br. for the U.S. as Amicus Curiae 16, *Christensen, supra* (No. 98-1167)—that the statute's specification of one instance in which an employer could control an employee's use of compensatory time created a negative implication that an employer could not otherwise control employees' use of compensatory time. Finally, in *Lindh* v. *Murphy*, 521 U.S. 320 (1997)—in which, as amicus himself notes (Br. 17), the Court used *Russello*-type reasoning—the dissent criticized the majority for relying on "one canon of statutory interpretation, *expressio unius est exclusio alterius*, to the exclusion of all others." See 521 U.S. at 337 (Rehnquist, C.J., dissenting, joined by Scalia, Kennedy, and Thomas, JJ.).[1]

3. Amicus also mistakenly argues (Br. 11) that the government's interpretation of the word "final" in Section 2255 must be rejected because it renders superfluous the language in Section 2244 that clarifies that a judgment of conviction becomes final at the "conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). That language is not superfluous under the government's interpretation. At a minimum, the language serves to confirm the presumption that, in Section 2244 and elsewhere in the AEDPA, the finality of a judgment of conviction is determined in accordance with the standard established in this Court's collateral review cases.

Congress may have included the language for other reasons as well. As petitioner suggests (Pet. 22), Congress may have been concerned that courts would otherwise conclude that the date on which a judgment of conviction becomes final under Section 2244 depends on the definition of finality used by the State of conviction. Although amicus is

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[1] Courts of appeals have likewise recognized that the *Russello* presumption is an application of the *expressio unius* canon. See, *e.g.*, *United States* v. *Male Juvenile*, 280 F.3d 1008, 1015 (9th Cir. 2002); *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998).

correct (Br. 11) that the meaning of "final" in Section 2244 is a question of federal law, that fact would not necessarily preclude adoption as the federal definition the relevant state law definition. See, *e.g.*, *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956); *Reconstruction Fin. Corp.* v. *Beaver County*, 328 U.S. 204, 209 (1946). In addition, Congress may have been concerned that, absent the clarifying language in Section 2244(d)(1)(A), courts might assume that the limitation period in Section 2244 begins at the same time as the limitation period in Section 2263, which applies to state prisoners serving capital sentences in States that qualify for expedited collateral review procedures. Because Section 2244 and 2263 both concern state prisoners, Congress may have determined that there was a particular risk that courts would conclude that the time limit in Section 2244 should, like the time limit in Section 2263, run from the conclusion of state court review rather than the expiration of the time to seek review in this Court. See U.S. Br. 32.[2]

B. There Is No General Rule That A Judgment Of Conviction Becomes Final When The Court Of Appeals Issues Its Mandate

Amicus contends (Br. 22-36) that there is a "broadly established" (Br. 22) rule that a judgment becomes final when the court of appeals issues its mandate on direct appeal. There is, however, no such general rule. Although a mandate-based definition of finality has been used in a few

[2] Amicus relies (Br. 20-21) on Section 2263 to support his interpretation of Section 2255 by making a negative implication argument similar to the one he makes based on Section 2244. As the government explained in its opening brief (at 30-31), the negative implication argument based on Section 2263 is unpersuasive for the same reasons that the argument based on Section 2244 is unpersuasive. The argument based on Section 2263 also fails because Section 2263 is so dissimilar in language and structure to Section 2255 that it is inappropriate to draw any inference from differences in language between the two provisions.

situations, it is only one of several alternative definitions that may apply depending on the particular context. There is no reason to conclude that Congress intended "final" to have that meaning in Section 2255 rather than the term's established meaning in the law of collateral review.

1. Contrary to amicus's suggestion, there is no one "broadly established" (Br. 22) understanding of when a judgment becomes final. Rather, differing definitions of finality apply depending on the circumstances.

a. As discussed above, in the collateral review context, a judgment not reviewed by this Court is considered final when this Court denies review or the time to petition for a writ of certiorari expires. See pp. 1-2, *supra*. In certain other situations, a judgment is considered final upon its entry by the district court. Thus, a judgment is "final" for the purpose of whether it may be reviewed on appeal when "there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989) (internal quotation marks and citations omitted). A judgment of conviction is final for that purpose "after conviction and imposition of sentence." *Ibid.* The Court has also used that definition of finality in applying the principle that the privilege against compelled self-incrimination adheres only until "the judgment of conviction has become final." *Mitchell* v. *United States*, 526 U.S. 314, 326 (1999) (equating finality of the judgment of conviction with the time at "which the sentence has been fixed").[3]

[3] In *Melkonyan* v. *Sullivan*, 501 U.S. 89, 95 (1991), the Court stated that, "[t]raditionally, a 'final judgment' is one that is final and appealable." Based on that understanding, the Court described the definition of "final judgment" in the Equal Access to Justice Act, 28 U.S.C. 2412(d)(2)(G) ("final and not appealable"), as "unusual." 501 U.S. at 95. Those statements refer to situations in which a judgment is final upon its issuance by

In still other circumstances, a judgment is considered final when the court of appeals fully resolves the appeal (even though the court has not yet issued its mandate). For example, for the purpose of seeking review from this Court, a judgment "'is final when the issues are adjudged' and settled with finality." *Scofield* v. *NLRB*, 394 U.S. 423, 427 (1969) (quoting *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945)). "[F]inality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment." *Market St. Ry.*, 324 U.S. at 551. Thus, even for state court judgments, which this Court may review only if they are "final" (28 U.S.C. 1257), "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate." Sup. Ct. R. 13.3.[4]

b. In a few limited situations, some courts of appeals have ruled that the finality of a judgment occurs upon the issuance of the mandate by the court of appeals. But, contrary to amicus's contention, those decisions do not establish a general definition of finality, even "with regard to the commencement of statutes of limitations and other time bars." Amicus Br. 22.

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the district court. Because amicus does not contend that "final" has that meaning for purposes of Section 2255, his reliance (Br. 28-29, 37) on *Melkonyan* is misplaced.

[4] Amicus notes (Br. 31-35) that, when a court employs the definition of finality based on entry of judgment by the district court or the definition based on entry of the judgment by the court of appeals, finality is generally suspended by the filing of a motion for reconsideration of the judgment. Amicus further notes (Br. 31, 35) that only the actual filing of such a motion suspends the finality of the judgment. Contrary to amicus's contention (Br. 36), however, those facts have no relevance here. No one—not amicus, the parties to this case, or any court of appeals—contends that Congress employed either of those definitions of finality in Section 2255. Furthermore, a petition for a writ of certiorari is not equivalent to a motion for reconsideration.

As amicus notes (Br. 22-27), *some* courts have adopted a mandate-based definition of finality in interpreting the term "final judgment" in the prior version of Federal Rule of Criminal Procedure 33 authorizing a motion for a new trial based on newly discovered evidence and the term "final" in the Speedy Trial Act of 1974, 18 U.S.C. 3161(d)(2) and (e). One court of appeals has relied on that understanding of finality in construing Missouri's "savings" statute, which allows certain tort plaintiffs to refile dismissed claims after the statute of limitations has run. See *Glick* v. *Ballentine Produce, Inc.*, 397 F.2d 590 (8th Cir. 1968). Even in those situations, however, there is no uniformly held view that finality occurs when the court of appeals issues its mandate.[5]

Nor does a mandate-based definition of finality generally apply to other limitation provisions. For example, none of the time limits for seeking review by this Court runs from the issuance of the mandate. See p. 10, *supra*; 28 U.S.C. 2101; Sup. Ct. R. 13.3, 18.1. Similarly, although there are two other limitation periods for seeking collateral review in the AEDPA, neither of those periods runs from issuance of the mandate by the appellate court. See 28 U.S.C. 2244 (conclusion of review by this Court or expiration of time to seek review); 28 U.S.C. 2263 ("State court affirmance").

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[5] See *United States* v. *Reyes*, 49 F.3d 63, 66 (2d Cir. 1995) (noting disagreement among district courts on whether "final judgment" under former Rule 33 occurs when court of appeals enters judgment or when court issues mandate); Amicus Br. 27 n.9 (acknowledging that some courts of appeals have held that the speedy trial clock resumes not when the mandate issues but when the district court receives it); *Owens* v. *Hewell*, 474 S.E.2d 740, 741-742 (Ga. Ct. App. 1996) (limitation period under Georgia savings statute runs from entry of judgment on appeal); *Kendrick* v. *City of Eureka*, 82 Cal. App. 4th 364, 371 (2000) (federal savings statute for supplemental state claims (28 U.S.C. 1367(d)) requires plaintiffs to file their state law claims in state court within 30 days of entry by the federal court of appeals of the judgment affirming the dismissal of those claims).

2. Not only is there no established rule that a judgment becomes final when the court of appeals issues its mandate, but there also is no other reason to assume that Congress used a mandate-based definition in Section 2255. Section 2255 concerns collateral review, and none of the situations in which courts have used the mandate-based definition of finality involves that same context. Former Rule 33 provided for a motion for a new trial based on "newly discovered evidence," Fed. R. Crim. P. 33 (1997); that form of motion, unlike Section 2255, does not involve a collateral attack on the court's legal or factual rulings.[6] And the Speedy Trial Act's purpose is to promote speedy trials; it does not address policies related to collateral challenges of convictions.

The language of the Speedy Trial Act also differs in a critical respect from Section 2255 in a way that reinforces the distinction between the provisions. The Speedy Trial Act refers to the finality of the appellate action that brings about the need for the retrial. See 18 U.S.C. 3161(d)(2) (referring to when "the action occasioning the trial becomes final"); 18 U.S.C. 3161(e) (same regarding "the action occasioning the retrial"). Section 2255, in contrast, speaks of the finality of the "judgment of conviction." 28 U.S.C. 2255 para. 6(1). Likewise, the Missouri statute construed in *Glick* does not speak of the finality of judgments. See *Glick*, 397 F.2d at 591-592 (quoting Mo. Ann. Stat. § 537.100). Indeed, the portion of the Missouri statute at issue in *Glick* employs neither the word "final" nor the word "judgment." See *ibid.* As for former Rule 33, that Rule, unlike Section 2255, expressly refers to the defendant's "appeal." See Fed. R. Crim. P. 33 (1997). That reference supports defining "final judgment" for purposes of Rule 33 by reference to the

[6] A motion for new trial based on grounds other than newly discovered evidence had to be filed "within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period." Fed. R. Crim. P. 33 (1997).

finality of the appeal of right rather than the finality of direct review.

Amicus finds the Rule 33 definition of finality "noteworthy" (Br. 22-23 n.6) because, in the legislative history of an early formulation of the Section 2255 time bar, Congress indicated a desire to bring "the availability of collateral relief into closer conformity with the approach taken by Federal law in other contexts," such as Rule 33, under which there were time limits on review of federal convictions. S. Rep. No. 226, 98th Cong., 1st Sess. 10 (1983). As the government noted in its opening brief (at 22 n.6), however, Congress also indicated in that legislative history that "the time at which the judgment of conviction becomes final" (S. 1763, 98th Cong., 1st Sess. § 6, at 7 (1983)) is when "remedies on direct review are exhausted or the time for seeking direct review has expired." S. Rep. No. 226, *supra*, at 30. Thus, that legislative history refutes, rather than supports, amicus's contention that Congress intended to incorporate the mandate-based definition of finality that some courts had used under Rule 33. Instead, the legislative history indicates that Congress intended to incorporate the meaning of finality advanced by petitioner and the government. See U.S. Br. 22 n.6.

Amicus also argues (Br. 23 n.6) that a parallel interpretation of Rule 33 and Section 2255 is appropriate because a motion under Section 2255, like a motion under Rule 33, is "a further step in the defendant's *criminal* case." *Ibid.* In certain respects, a Section 2255 motion is a further step in the movant's criminal case. See 28 U.S.C. 2255 Rule 1 advisory committee's note. For example, no filing fee is required, the files from the criminal case are available to the court reviewing the motion, the Federal Rules of Criminal Procedure may govern discovery and certain other aspects of the proceeding, and a broad range of relief is available. See *ibid.* More fundamentally, however, Section 2255 is "a

remedy analogous to habeas corpus by state prisoners." 28 U.S.C. 2255 Rule 12 advisory committee's note. Thus, as this Court has explained, "a motion under § 2255, like a petition for a writ of habeas corpus, is not a proceeding in the original criminal prosecution but an independent civil suit." *Heflin* v. *United States*, 358 U.S. 415, 418 n.7 (1959) (citation omitted). See also *Andrews* v. *United States*, 373 U.S. 334, 338 (1963) ("An action under 28 U.S.C. § 2255 is a separate proceeding, independent of the original criminal case.").

That characteristic of Section 2255 has important ramifications, particularly for time limit provisions. Unlike appeals from orders denying Rule 33 motions, which are governed by the time limit for criminal appeals, "[a]ppeals from orders denying motions under Section 2255 are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions." *United States* v. *Hayman*, 342 U.S. 205, 209 n.4 (1952). Thus, the time limit for filing a notice of appeal under Section 2255 is the same civil time limit that governs habeas cases. See 28 U.S.C. 2255 Rule 11 advisory committee's note. And the time limit for filing a petition for a writ of certiorari in a Section 2255 case is the same civil time limit that governs habeas cases. *Heflin*, 358 U.S. at 418 n.7. There is no reason to conclude that Congress silently departed from that practice and modeled the time limit for filing a Section 2255 motion on the time limit for filing a Rule 33 motion, rather than the time limit that governs habeas cases.

3. Because a Section 2255 motion, like an analogous petition for habeas corpus, is a form of collateral relief, the relevant definition of "final" for purposes of Section 2255 is the definition used in this Court's collateral relief cases. As described above, this Court has consistently used that definition for nearly forty years, and Congress presumably intended to incorporate that well established definition when it used the term "final" in Section 2255. See p. 1-2, *supra*.

Amicus mistakenly contends (Br. 37-40) that this well-established definition of finality is not applicable here because the Court has used that definition only when deciding whether to apply a new rule retroactively. Contrary to that contention, the Court has used the definition whenever the Court has sought to delineate when direct review ends and collateral review begins. Thus, the Court has used the same definition of finality even when the Court took the position that the retroactivity of a new rule should not turn on whether the judgment of conviction to which the rule would apply has become "final." See *Johnson* v. *New Jersey*, 384 U.S. 719, 726 (1966).

Moreover, the Court has used the same definition of finality even in cases that have not involved the retroactivity question at all. Thus, in *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983), the Court noted that "the process of direct review * * * includes the right to petition this Court for a writ of certiorari", in the course of explaining that, when direct review has concluded, "a presumption of finality and legality attaches to the conviction" that limits the role of collateral review. In *Bell* v. *Maryland*, 378 U.S. 226 (1964), the Court addressed the common law rule that repeal of a criminal law results in dismissal of a criminal conviction if "the legislature acts before the affirmance of the conviction becomes final." *Id.* at 232. The Court noted that the rule applies to any criminal case that "has not yet reached final disposition in the highest court authorized to review it," *id.* at 230, and held that a judgment is not final for purposes of the rule when it is "on direct review in this Court." *Id.* at 232.

In fact, even amicus acknowledges (Br. 39) that the "sharp line between 'direct' and 'collateral' review" reflected in the Court's definition of finality derives from the "function" and "scope of the writ of habeas corpus." As explained above, a motion for collateral relief under Section 2255 is "analogous to habeas corpus by state prisoners." 28 U.S.C. 2255 Rule 12

advisory committee's note. In view of that fact, the Court uses the same definition of finality for federal and state prisoners. See *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6, 328 (1987) (using single definition of "final" in resolving consolidated federal and state cases). There is no reason why Congress would have drawn a distinction where the Court has not.

C. Differences In Collateral Review Of State And Federal Convictions Do Not Support Different Definitions Of Finality In Section 2244 And 2255

1. Amicus erroneously suggests (Br. 41-46) that different definitions of finality for state and federal prisoners are justified by differences between habeas corpus and collateral relief under Section 2255. As explained above, habeas corpus and Section 2255 are fundamentally analogous remedies. In enacting Section 2255, Congress "simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and collateral review." *United States* v. *Addonizio*, 442 U.S. 178, 184 (1979). Section "2255 was intended to mirror [habeas] in operative effect." *Davis* v. *United States*, 417 U.S. 333, 344 (1974). Although there are some minor differences between Section 2255 and habeas, amicus overstates those differences, none of which bears on the issue presented by this case.

Amicus again notes (Br. 41-42) that Section 2255 is in some respects a continuation of the criminal case and that consequently courts can provide broader relief under Section 2255 than under habeas. Amicus fails, however, to offer any reason why the broader range of relief available under Section 2255 would have led Congress to provide a shorter period within which to file a Section 2255 motion. Amicus also overlooks that Congress and this Court have consistently applied the same time limits to Section 2255 motions and habeas actions notwithstanding Section 2255's

status as a continuation of the underlying criminal case. See p. 14, *supra*. Amicus also notes (Br. 42) that habeas review allows consideration of claims that have already been reviewed by state courts, while relief under Section 2255 is generally limited to claims not raised on direct review. Once again, however, amicus does not suggest why Congress would view that difference as warranting a shorter period within which to file Section 2255 motions. To the extent that a Section 2255 movant is more likely than a habeas petitioner to be raising claims that he has not raised previously, that difference (if it were to have any impact on the time limits for filing) would seem to justify providing Section 2255 movants with more time rather than less.

Amicus also errs in contending (Br. 42-46) that "finality" has a different meaning for state and federal prisoners. This Court has held repeatedly that "the interest in finality is the same with regard to both federal and state prisoners." *Francis* v. *Henderson*, 425 U.S. 536, 542 (1976) (quoting *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969)). Therefore, just as the Court has applied the same definition of finality to state and to federal prisoners, it has consistently applied the *Teague* doctrine and other rules governing collateral relief equally to both federal and state prisoners, notwithstanding the absence of federalism and comity concerns in the federal context. See *Bousley* v. *United States*, 523 U.S. 614 (1998) (applying *Teague* principles to Section 2255 motion); *Reed* v. *Farley*, 512 U.S. 339, 353-355 (1994) (scope of cognizable statutory claims is the same for state and federal prisoners); *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982) (cause and prejudice standard applies equally to state and federal prisoners); *Davis*, 417 U.S. at 344 ("grounds for relief under § 2255 are equivalent to those encompassed by § 2254").

Relying on three district court decisions (Amicus Br. 43 n.19), amicus incorrectly asserts (Br. 42) that a state

prisoner cannot file a habeas petition until the time has expired for the prisoner to file a petition for certiorari on direct review. Although a state prisoner was at one time required to petition for certiorari in his direct appeal in order to exhaust his state remedies, see *Darr* v. *Burford*, 339 U.S. 200, 207 (1950), that is no longer the law. See *Fay* v. *Noia*, 372 U.S. 391, 435-438 (1963). This Court has described *Fay* as "reject[ing]" the "argument that habeas corpus review was unavailable in advance of a petition for certiorari." *County Court* v. *Allen*, 442 U.S. 140, 149 n.7 (1979). In *Allen*, the Court also cited *Stevens* v. *Marks*, 383 U.S. 234 (1966), noting that, in that case, "the Court entertained a challenge to a state statute in a federal habeas corpus proceeding even though the defendant had not pursued that challenge on appeal to this Court prior to filing his petition for habeas corpus." 442 U.S. at 149 n.7.

The district court's decision in *Stevens* is one of the three district court rulings on which amicus relies. But the district court in *Stevens* actually held that "a state prisoner may, in an appropriate case, seek relief in the district court by way of habeas corpus, notwithstanding that direct review in the Supreme Court is still open to him." *United States ex rel. Stevens* v. *McCloskey*, 239 F. Supp. 419, 422 (S.D.N.Y.), aff'd on other grounds, 345 F.2d 305 (2d Cir. 1965), rev'd, 383 U.S. 234 (1966). In any event, as the Court recognized in *Allen*, this Court's review of the merits of the habeas petition in *Stevens* demonstrates that, contrary to amicus's assertion, a state prisoner is not barred from seeking habeas relief before the time expires within which he could seek certiorari in his direct appeal. See also, *e.g.*, *Hedberg* v. *Pitchess*, 362 F.2d 511 (9th Cir. 1966) (reversing dismissal of habeas petition on ground that time for certiorari on direct review had not expired). There is therefore no difference in the time at

which state and federal prisoners can first seek collateral relief.[7]

2. The absence of any reason why Congress would have imposed different time limits on state and federal prisoners reinforces the conclusion, based on the established definition of finality in the collateral review context and the text of the AEDPA, that a judgment of conviction becomes final for purposes of Sections 2244 and 2255 at the same time—the conclusion of direct review by this Court or the expiration of the time for seeking such review. As explained in the government's opening brief (at 22-26), that rule also advances the orderly administration of justice.

The period for commencing a collateral attack should not start to run until the law that will govern the defendant's entitlement to post-conviction relief is settled, and, under *Teague* v. *Lane*, 489 U.S. 288 (1989), that occurs only when the time for seeking certiorari on direct appeal has expired. Amicus's alternative proposal (Br. 46)—that federal defendants amend their Section 2255 motions to account for subsequent changes in the law—is inefficient. There is no reason to believe that Congress intended for collateral review to proceed in that piecemeal fashion.

Moreover, although amicus points out (Br. 47) that, even under the government's reading of Section 2255, some prisoners may file frivolous petitions for certiorari on direct review in order to prolong the time within which to seek collateral relief, the rule proposed by amicus would provide an even greater incentive for prisoners to adopt that tactic.

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[7] The other district court decisions on which amicus relies held that the petitioners had failed to exhaust state remedies. See *Raines* v. *New York*, 992 F. Supp. 160 (N.D.N.Y. 1998); *King* v. *Cook*, 287 F. Supp. 269 (N.D. Miss. 1968). *Allen* makes clear, however, that the possibility of review by this Court is not a state remedy that must be exhausted. See 442 U.S. at 149-150 n.7.

U.S. Br. 25-26. There is no cause to provide any additional incentive (no matter how slight) for frivolous filings.

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For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded to that court for further proceedings.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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